



## Opportunities and Pitfalls in Direct Response Marketing

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## Today's Speakers

- **Stephanie Blackman, Esq.**  
**Guthy|Renker LLC**
- **Robert J. Bolger, Jr., Esq.**  
**Venable LLP**
- **Edward R. Glynn, Jr., Esq.**  
**Venable LLP**



## Robert J. Bolger, Jr., Esq.



Bob Bolger is a partner with the law firm Venable LLP

Mr. Bolger is a business and tax attorney who specializes in advising companies engaged in direct response marketing sales and distribution. He has significant experience in representing direct response marketing companies in all aspects of their business, both in the United States and internationally, including advertising and marketing agreements, licensing, and distribution agreements, intellectual property agreements and joint venture agreements. Mr. Bolger received his Juris Doctor as well as a B.A. with highest distinction from the University of Virginia.

Mr. Bolger has negotiated and brought to closing numerous business transactions for clients with worldwide interests. He is particularly effective in direct response marketing and providing guidance to these clients in attaining their business goals in a cost-efficient and effective manner



## Stephanie Blackman, Esq.



Stephanie Blackman serves as General Counsel and Senior Vice President of Business Affairs for Guthy|Renker LLC. Ms. Blackman has been with Guthy|Renker LLC since 1997 and oversees all aspects of the Company's legal division, including advertising, marketing and business transaction matters.

She has substantial experience in all aspects of direct response marketing, including licensing, distribution agreements, complex intellectual property agreements and regulatory compliance.

Ms. Blackman received her Juris Doctor with distinction from the UCLA School of Law and a B.A. Magna Cum Laude and Phi Beta Kappa from the University of Colorado.



## Edward R. Glynn, Jr., Esq.



Edward Glynn practices in the area of advertising law and trade regulation. He served 14 years with the Federal Trade Commission (FTC), rising from Trial Attorney to Associate Director. During that period, he led several of the most significant investigations undertaken by the Commission and represented the FTC extensively in litigation in the United States District Courts and Courts of Appeal.

His extensive experience in electronic direct response marketing allows him to bring a broad background, in both government and private industry to the solution of marketing issues. He provides counsel and representation to many of the leading companies in the direct response marketing industry, as well as other major advertisers.



# Guthy | Renker



Guthy | Renker.

VENABLE<sup>®</sup>LLP

# License of Product

- **IP Rights**

- n Patents
- n Copyrights
- n Trademarks

- **Improvements and Modifications**

- **Product Line Extensions**

- n Ancillary formulas



## Grant of Rights

Exclusive or Nonexclusive

Channels of Distribution

Right to Use Inventor's  
Name and Likeness

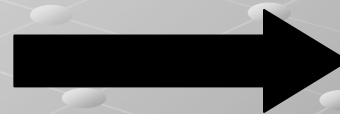
Right of First Refusal



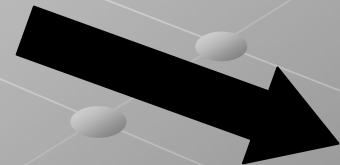
# Territory



Country specific  
or worldwide



Country specific  
commencement dates  
and minimums



Options or right of  
first refusal for  
new territories

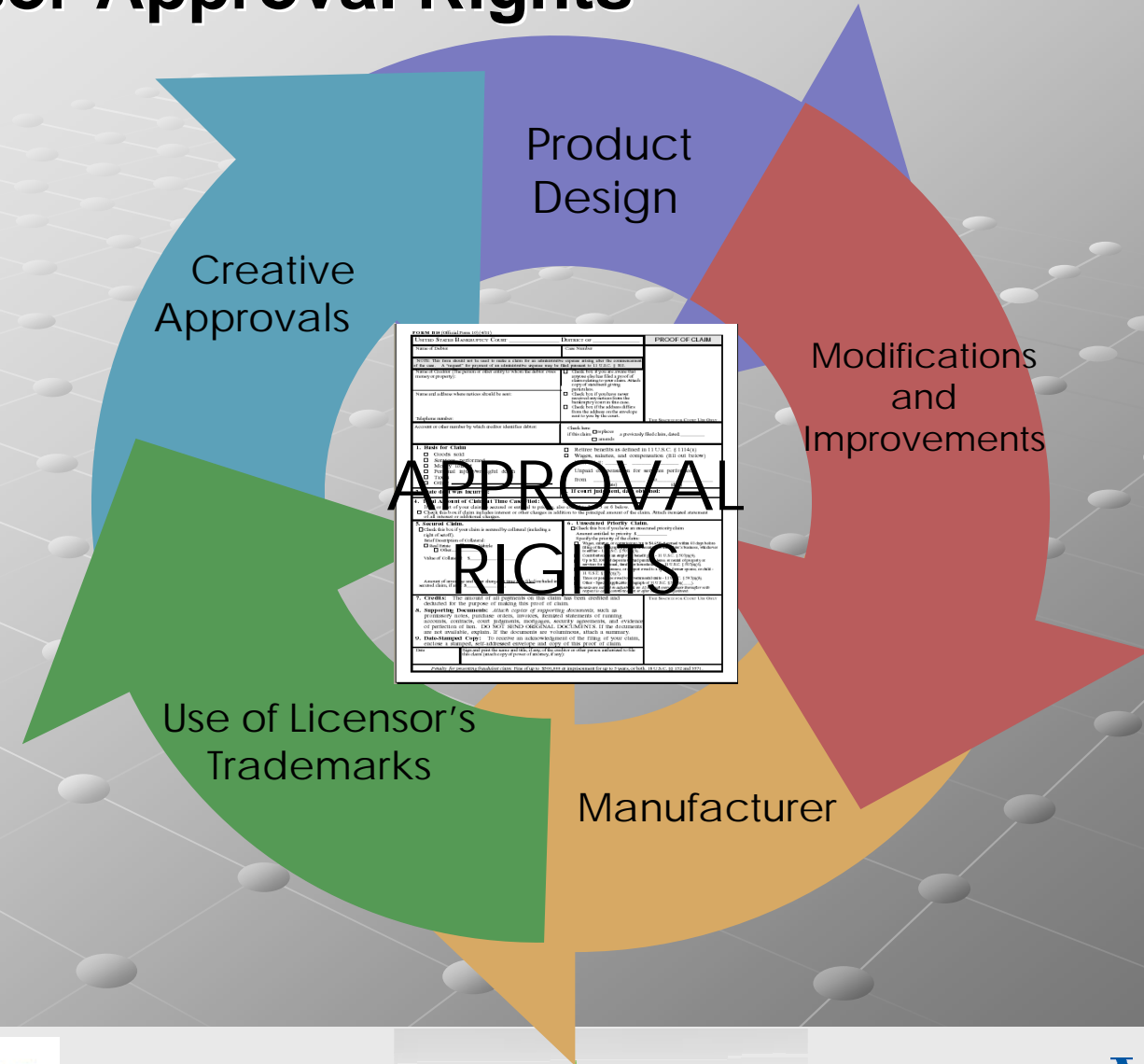
## Compensation Terms and Term Periods

- Royalties  
(generally % of adjusted gross revenues)
- Royalty adjustments
- Payment terms  
(advances)



- Test period
- Roll out
- Annual minimums
- Renewal terms
- Separate terms for  
different territories

# Licensor Approval Rights



# Licensors Responsibilities

Appearances in infomercials  
or other advertisement

Home shopping channel  
appearances

Product modifications  
and improvements

Additional fees/expenses

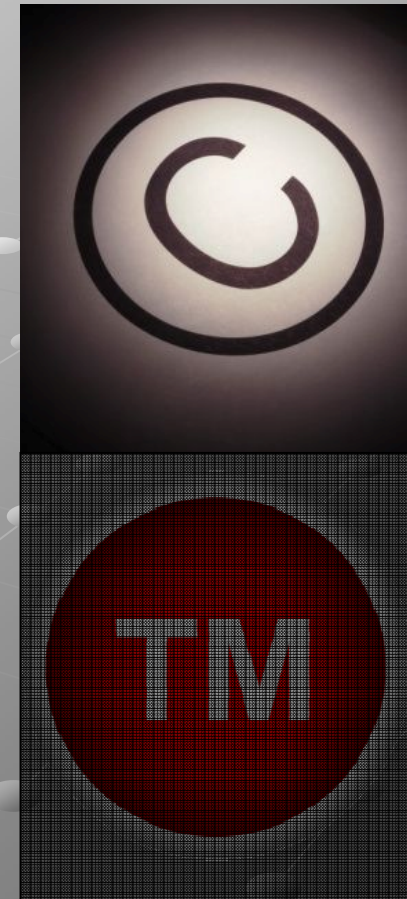
# Licensee Responsibilities

- Infomercial Production
- Testing and Rollout
- Fulfillment
- Quality Control/Customer Service
- Reporting



# Ownership of Intellectual Property

- Ownership of advertisement and marketing materials
- Post term rights and IP transfers upon termination
- Indemnification
- Third-party rights
  - Talent, music, etc.
- Rights to improvements
- Rights to customer lists

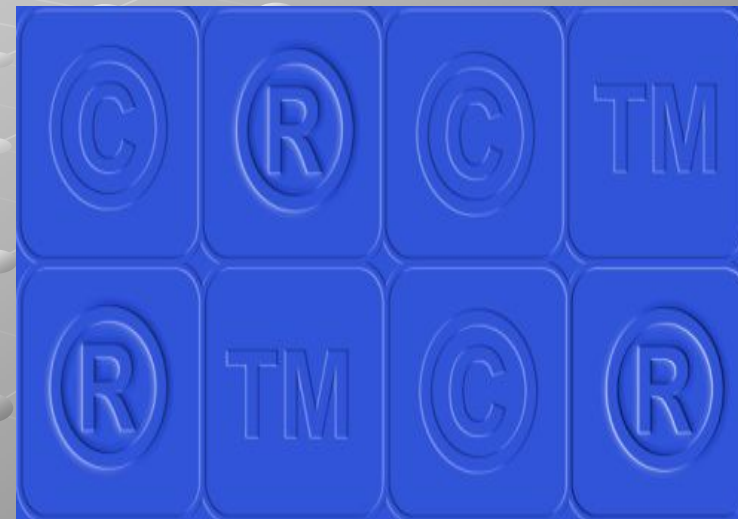


# Intellectual Property Protection

Filing and Maintenance

Infringement Responsibility

Cost



# Restrictive Covenants

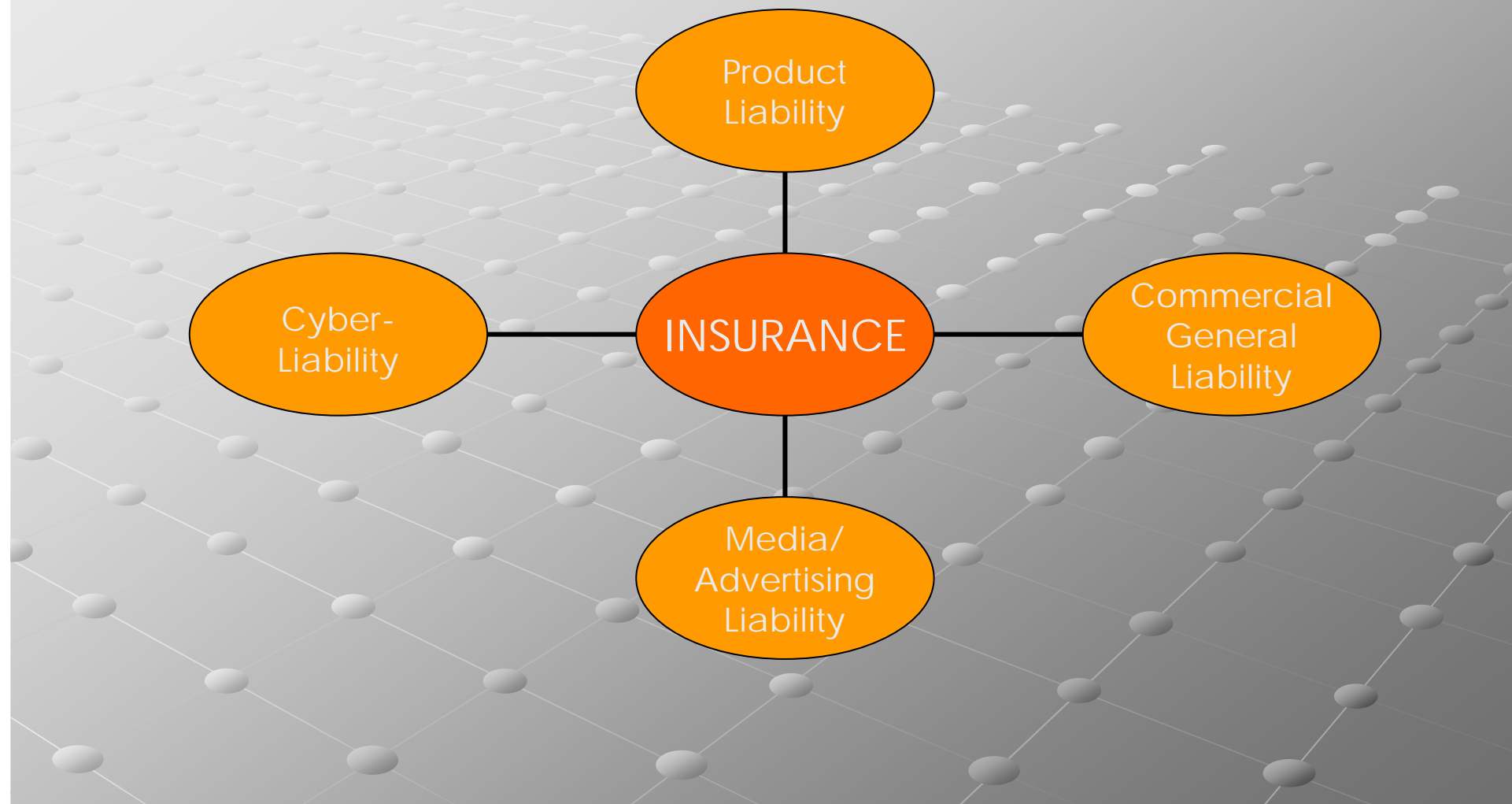


Non-Competition

Confidentiality



# Insurance



# Indemnification

- **Breach of representations and warranties**
- **IP infringement**
- **Product liability**
- **Marketing and content claims**



# Audit Rights

Frequency

Scope

Cost

Time Period covered by Audit

# Sublicense Rights

- Partial v. Complete Sublicense
- Licensor Approval
- Protection from Infringement
- Responsibility of Licensee for Actions of Sublicense

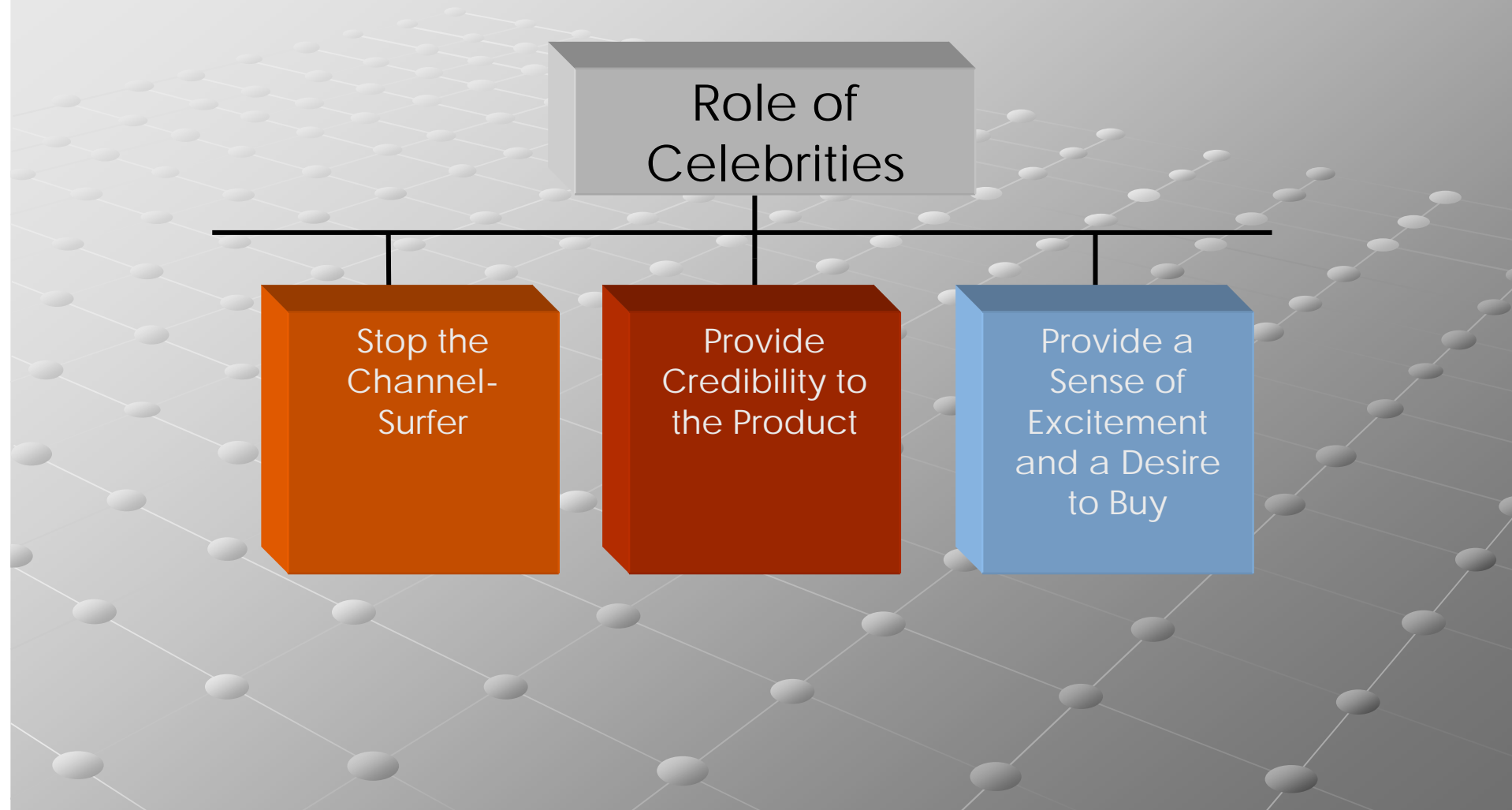


## In-House Counsel Checklist for Direct Response Marketing Campaign

- Review and licensing of product
- Patents, trademarks and other intellectual property rights
- Engaging a production company
- Script development and review
- Identifying and securing talent
- Substantiation of product claims
- Regulatory compliance
- Releases for testimonials
- Engaging a manufacturer
- Testing of campaign
- Rollout of campaign
- Media buying
- Website and online ordering processes
- Fulfillment
- Customer support



# Direct Response Marketing



## Spokesperson v. Endorser/Testimonial

### SPOKESPERSON

A spokesperson talks about the product, may praise the product and be excited about the product.

The spokesperson may act as an “interrogator” or an “expert” who explains the features and benefits of the product.

### CELEBRITY

A celebrity becomes an endorser or testimonialist (the two are treated identically by the Federal Trade Commission) when statements by the celebrity (or demonstrations or depictions of the celebrity) make a claim ‘that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a Party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.’”

## Key Differentiators

- Endorsements involve statements by the celebrity describing their personal experience with the product or their personal views of the product.
- Endorsements are governed by the FTC Guides on Endorsements and Testimonials, 16 CFR Part 255.





## Celebrity Endorsement Factors

- Must reflect the honest opinions, findings and beliefs or experience of the endorser.
- Cannot convey any representation that would be deceptive if made directly by the advertiser.
- The advertiser cannot continue to use the celebrity endorsement if the advertiser is on notice the celebrity no longer subscribes to the opinions expressed.



## The Celebrity as Expert

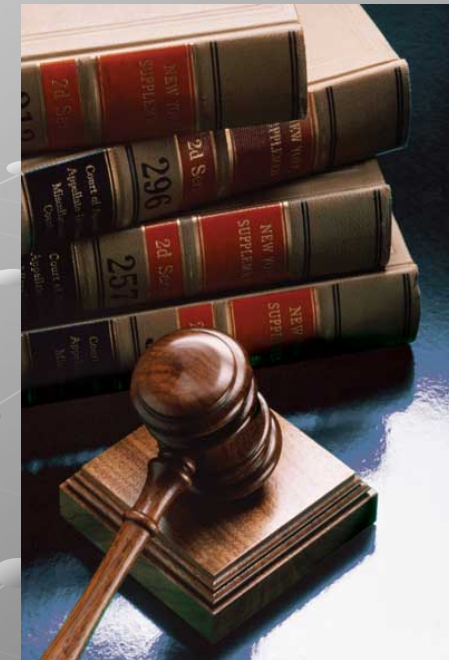
- If the celebrity is also an “expert” (e.g., pro golfer discussing golf equipment, professional chef discussing kitchen equipment), the celebrity must in fact have analyzed the product using his/her expertise and have the opinions/judgments about the product that are expressed.
- This cannot be a “they pay me and I say what they want” experience. If the celebrity represents that he/she uses the product, that must be the case.
- If the celebrity claims that the product endorsed is superior to other products, the celebrity must have a basis for that belief.



**FTC Does Not  
Require Disclosure  
That Celebrity  
Was Compensated  
For Appearance**

## Endorser Liability

- In the aftermath of the *Garvey* case, the Ninth Circuit expressed doubts that the Endorsement Guides applied to endorsers – as opposed to just marketers.
- FTC amended the Guides to make clear that endorsers who don't follow the Guides can be held individually liable – as well as the marketers for whom they work.



## Spokesperson Liability

- The standard of liability is found in *FTC v. Steven Patrick Garvey*, 383 F.3<sup>rd</sup> 891 (9<sup>th</sup> Cir. 2004). For the FTC to hold a spokesperson liable they must show that:
  - n The participant was “recklessly indifferent to the truth of his statements” or
  - n “. . . was aware that fraud was highly probable and intentionally avoided the truth.”
- This assumes that the spokesperson is not the marketer or a partner of the marketer but just hired to sell the product.



## Good Faith Belief

- In the Garvey case, the spokesperson had tried the product and lost weight as had his wife, and had reviewed various booklets and papers on the product discussing the rationale behind the active ingredients in the product.
- The court found that “Garvey had first-hand anecdotal evidence of the efficacy of the Enforma System and had information that purported to present scientific bases for his claims.”
- In most cases, a lawyer/agent should look at the claims and take a first pass on whether the smell test is passed.



## Final Thoughts on Celebrity Endorsements

- **Celebrity statements about his/her experience with the product in an advertisement must be true. We do not live in a world where diction is allowed.**
- **If the celebrity is acting as an expert, he/she must have a basis for the opinions they discuss.**
- **Celebrities serving as spokespersons need to conduct some investigation to ensure the basic claims being made in the spot/informercial are truthful and substantiated.**
  - n This can be less than the marketer, but the celebrity must have a “good faith belief” and not be “recklessly indifferent” to the truth.



# DISCUSSION

